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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

Nos. 368, 369, 370

LOUIS H. ROSENBLUM,
Petitioner, Appellant Below,
vs.
UNITED STATES OF AMERICA,
Respondent, Appellee Below.

MAX STRYK,
Petitioner, Appellant Below,
vs.
UNITED STATES OF AMERICA,
Respondent, Appellee Below.

JACOB WEISS,
Petitioner, Appellant Below,
vs.
UNITED STATES OF AMERICA,
Respondent, Appellee Below.

SEPARATE AND SEVERAL PETITION FOR REHEARING

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SEPARATE AND SEVERAL PETITION FOR REHEARING

Louis H. Rosenblum, Max Stryk and Jacob Weiss, each petitions for a rehearing upon his separate and several petition for a writ of certiorari, denial of which was made by this Court on December 5, 1949.

INTERVENING CIRCUMSTANCES

Since the preparation of said petitions for certiorari, the judgment of the United States Court of Appeals for the Seventh Circuit of June 13, 1949, which reversed the conviction of petitioners on the conspiracy indictment, has become final; the October 1948 term in which such judgment was rendered expired on October 2, 1949. (Rule 2, Title I, General Rules of the Court of Appeals for the Seventh Circuit.) The motion of the Government for rehearing was overruled by the Court of Appeals on August 24, 1949. No further application was made by either of the parties to reverse, or review such judgment.

Said judgment of the Court of Appeals now controls the rights of the parties herein; it has become the law of the case as to all matters therein properly decided, and such decision is now binding upon this Court.

Such judgment determines that:

(a) The substantive indictments, and the conspiracy indictments were tried below (R. 398), and all of the convictions on all of the charges (including those sought to be reviewed by this Court) rest, on the theory, finding and conclusion that the defendants were engaged in the same joint enterprise. (R. 399, 400.)

(b) Under the peculiar circumstances of these cases, the trial on the conspiracy charge embodied the same crime as that based on the substantive charges. (R. 399, 400.)

(c) The trial court failed to differentiate between the proof relative to the substantive offenses and that relative to the conspiracy charge. (R. 399-402.)

(d) The proceedings in the trial court, including the erroneous admission of testimony, were so preju-

dicial to the substantial rights of each petitioner that it was necessary to reverse the conspiracy conviction.

Having conclusively shown by the *final judgment* of the Court of Appeals that it was an abuse of judicial process to have returned the conspiracy charge, and that the trial court failed to differentiate between the proof relevant to the different charges (R. 398-402), petitioners very respectfully urge that they have shown by the record that they suffered substantial prejudice and in the trial there was a clear departure from the constitutional norm which guarantees them a fair and impartial trial.

The trial on different indictments for the same offense, at the same time, is shown by the record to have greatly aggravated the prejudicial effect upon their substantial rights; the legality of the conspiracy indictment was sustained upon the theory that it contained a sufficient charge of an offense separate from that charged in the substantive indictments (R. 401); the joint trial was had upon the theory that the statements of the different defendants which were admitted in evidence, and which were regarded as additional reasons for reversing the conspiracy charge, were admitted in the trial court, except as to the individual making such statements, against him solely and without prejudice to the others until and unless by proper evidence, a conspiracy is shown (R. 95); this resulted in getting incompetent prejudicial evidence in the record which the trial court could not and did not properly apply to the several charges. (R. 400-402.)

It was necessary to go to the Court of Appeals to find the true theory upon which the trials below were actually had, and its final judgment now establishes that petitioners were tried on the separate indictments (conspiracy and substantive) for one and the same offense:—that of having

engaged as participants in a joint enterprise designed to attempt to defeat and evade the payment of income taxes (R. 399, 400), as outlined in the conspiracy charge.

The conviction of conspiracy was reversed because, among other reasons, the trial court failed to differentiate between the proof relevant to the different charges. (R. 399.)

Petitioners thus bring into this Court a Record which goes one step further than Fiswick v. United States, 329 U. S. 211, where this Court was required to determine from the Record whether the error complained of wrongfully influenced the jury in arriving at its verdict.

In the instant cases no room for doubt exists; the final judgment of the Court of Appeals shows conclusively and determines judicially that the error was of such substance that it wrongfully influenced the trial court in arriving at its judgment. (R. 399.)

Nothing can be more vital or substantial in the enforcement of the criminal law than the right of the accused to be tried by a tribunal that can and does differentiate between the proof that is relevant to the respective charges made against him.

Nor is it fair and just that petitioners should be sent to the penitentiary for three years and each made to pay a fine of $10,000.00, plus court costs, upon a Record in which it is judicially established by the Court of Appeals—that the trier of their causes failed to distinguish between admissible and inadmissible evidence as to the proof relative to the crime charged against them.

In Kotteakos v. United States, 328 U. S. 750, where the record showed substantial prejudice, this Court said: "The inquiry cannot be merely whether there was enough

to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand."

The true situation in our cases is that, as a result of the wrongful consolidation of the different indictments, the Record became so confusing to the trial court that it could not and did not give the petitioners a fair trial. No trial is fair where the trier of the facts fails to differentiate properly as to the proof applicable to the charges upon which the accused is being tried; the unfairness of the instant trial is now judicially established by the judgment of the Court of Appeals; it becomes more acute and of greater prejudice when the reviewing court reverses only as to a part of the unfair result, and affirms as to the other, though equally contaminated.

These causes were so intermingled that the reversal of one necessitated reversal of the other.

Gentry v. Billing, 73 F. (2d) 925 (9 C. A.).

The error is clearly one which relates to the substantial rights of petitioners, and is obviously so prejudicial as seriously to "affect the fairness, integrity and public reputation of judicial proceedings"; and under such situation the writ prayed for should be granted.

United States v. Atkinson, 297 U. S. 157;
McCandless et ux v. United States, 298 U. S. 342.

ADDRESS OF MR. CHIEF JUSTICE VINSON

For the purpose of urging this petition, petitioners regard the address of Mr. Chief Justice Vinson, before the American Bar Association on September 7, 1949, as an intervening circumstance of substantial and controlling effect; the context of which was not brought to their attention until they read the weekly advance sheet of the Supreme Court Reporter of November 15, 1949.

This address is certainly a succinct and essential clarification of Rule 38 of this Court, and of value to petitioners in the presentation of substantial grounds available to them for the granting of their writ, although not previously presented in their petition.

We understand therefrom that the Court is especially interested in the actual, practical effect of the disputed decision—its consequences for other litigants and in other situations, and that petitioners should show why it is vital that the questions involved be decided finally by this Court.

With this additional information as to the real purpose of a petition for certiorari, we will present substantial grounds for the granting of the writ, not previously presented in the petition.

AS TO QUESTION ONE

Congress has provided that the taxpayer shall file a return setting forth to such extent, and in such detail, as the Commissioner with the approval of the Secretary may by regulations prescribe, the items of gross income and the

deductions and credits allowed pursuant to the income tax Chapter. Section 51 (a) of the Internal Revenue Code (Title 26, United States Code). Treasury, Bureau of Internal Revenue, Regulations 111, Section 29.51-1-2-4 and 5 prescribe "Form 1040" as the Income Tax Return form, which further requires that "Gross Income" be broken down and made to include the items of:

"1. Salaries," "2. Dividends," "3. Interest on corporation bonds," "4. Interest on Government obligations," "5. Annuities," "6. Net gain (or loss) from sale or exchange of property," "7. Rents and Royalties," "8. Net profit (or loss) from business or profession," "9. Income (or loss) from partnerships; fiduciary income; and other income."

All of such information is deemed material and must be supplied by the taxpayer in his tax return.

It is just as vital and material to the taxpayer, when indicted, to know what item of his return is claimed to be false, as it is to the Treasury to know the items which make up the total of his gross income.

Petitioners assert that as a concomitant part of the taxing plan created by Congress, which requires the taxpayer to itemize and break down his gross income, it is just as vital and material that the Government be required, in a prosecution under Section 145 (b), to set out in the indictments the particular item or items listed in the return *as filed by the taxpayer* which are claimed to be false.

The indictment returned against each petitioner contains facts required by Congress in income tax cases where unlawful evasions under Section 145 (b), Title 26, United States Code, are involved, and no part of such indictments can be treated as surplusage.

This has been regarded as the law for many years, and *it has been the practice* of the Department of Justice, *in its indictments* for unlawful evasions, *to follow the form* of setting out the items contained in the break-down of the income as listed in the taxpayer's return, and then descriptively to set forth the particular item alleged to be false. See

Lange v. United States (1942), 161 F. (2d) 699 (7 C. A.);

Gleckman v. United States (1935), 80 F. (2d) 394 (8 C. A.), certiorari denied, 297 U. S. 709;

Lustig v. United States (1947), 163 F. (2d) 85 (2 C. A.), certiorari denied, 332 U. S. 775.

Sabourin v. United States (1946), 157 F. (2d) 820 (2 C. A.), certiorari denied, 329 U. S. 800;

Locke v. United States (1947), 166 F. (2d) 449 (5 C. A.), certiorari denied, 334 U. S. 837;

United States v. Chapman (1948), 168 F. (2d) 997 (7 C. A.);

Barcott v. United States (1948), 169 F. (2d) 929 (9 C. A.), certiorari denied Feb. 14, 1949, 60 S. Ct. 602;

Maxfield v. United States (1946), 152 F. (2d) 593 (9 C. A.), certiorari denied, 327 U. S. 794;

United States v. Berman, 75 F. Supp. 789 (D. C. N. D. Georgia);

Rose v. United States, 128 F. (2d) 622 (10 C. A.);

United States v. Farrington, 11 F. Supp. 215 (D. C. M. D. Penn.);

United States v. Yoffe, 52 F. Supp. 175 (D. C. D. Mass.);

Singer v. United States, 58 F. (2d) 74 (3 C. A.).

In our cases, where the item alleged to have been omitted was "Dividends," the trial court ordered a bill of par-

ticulars to show the names of the corporations from which such dividends had been received; See Barcott v. United States, 169 F. (2d) 929, where a similar motion was sustained as to "Dividends."

During the trial of our cases, the trial judge held that such break-down was material. (R. 89, 259, 261.) It was after the defendants had waived their right to a jury trial on the facts as to whether they had received "Dividends" as defined by the Statute (Sec. 115(a) Internal Revenue Code), and after they had rested their cases, on June 28, 1948 (R. 262), without introducing evidence on either of the "Dividend" or "Joint venture" theories, and nearly *eight weeks after the trial was closed* on August 18, 1948 (R. 274) that the trial judge *first intimated,* and decided, when rendering judgment, that he could not see how the defendants could be prejudiced by labeling the income as "dividends" or "profits of a joint venture" or merely "other income." (R. 297.)

The decision in our cases frustrates the intent of Congress to harmonize and to unify the procedure throughout the United States in tax evasion cases; it destroys the long established practice and policy of the Department of Justice in setting out in indictments for tax evasion the material and essential facts *broken down,* to comply with due process as required by the Constitution, for the information of the accused in cases of this character.

To permit the opinion in the instant cases to stand undecided by this Court, leaves this very material question open and means that some courts will hold that the allegations itemizing the break-down are surplusage, as the Seventh Circuit has done in our cases, and others may hold that such break-down is essential and material; See:

Singer v. United States, 58 F. (2d) 74 (3 C. A.);
Rose v. United States, 128 F. (2d) 622 (10 C. A.);

United States v. Molasky, 118 F. (2d) 128, 131 (7 C. A.);
United States v. Farrington, 11 F. Supp. 215 (D. C. M. D. Penn.);
United States v. Yoffe, 52 F. Supp. 175 (D. C. D. Mass.).

The decision of the Seventh Circuit in our cases seems to be in conflict with the reasoning of said decisions of the Third and Tenth Circuits, and certiorari should now be granted to settle this vital, national question.

But the instant cases present a far more important question, of greater and more far-reaching consequence, than the determination of whether such break-down is material and necessary. Here, the break-down was actually made by the Grand Jury in the indictments, and it served to beguile and deceive the defendants; they relied on such allegations as being essential and material; they were encouraged by the trial court to believe that such allegations were material (R. 89, 259, 261); the Department of Justice believed such allegations to be material.

Consequently, defendants now very insistently challenge the right and the fairness of the Department of Justice in adopting this universal practice of alleging such break-down in the indictments, and, then, after conviction on a theory not outlined in the indictments, contend that such break-down was surplusage. In this situation, defendants deny the constitutional power of the lower courts to decide that such allegations were surplusage. The highest essence in the concept of due process is involved in and is violated by such illegal procedure.

Section 145(b), Internal Revenue Code, is violative of the Sixth Amendment to the Constitution if the taxpayer can be specifically charged with having omitted a speci-

fied amount of "Dividends" from his return, and then be convicted of having had receipts from a joint venture which were omitted from his return, but which was not charged in the indictment.

The language of Section 145 (b) is very broad, and provides severe punishment for a tax evasion "in any manner"; but the generality of this language *does not justify a violation of the Sixth Amendment;* it emphasizes the absolute necessity of requiring indictments to set out the specific manner in which the offense was committed, including the break-down of the particular items involved.

Our cases fully demonstrate the imminent danger to an accused of allowing an abandonment of this practice; petitioners were charged with omitting "Dividends" from their returns. By denying the writs, and thus giving tacit approval to the decision of the Seventh Circuit, that such allegation is surplusage, the door is wide open for grave injustice to taxpayers charged with evasion, for, under such charge, the accused can hereafter be convicted of having omitted "Salaries," "Interest," "Annuities," "Net Gains from sale or exchange of property," "Rents and Royalties," "Net profit from business or profession," "Income from partnerships, or other income" or any one or more thereof. Such result would be a palpable violation of the Sixth Amendment. If Section 145 (b) is susceptible to an interpretation which will permit any such result, then it is unconstitutional and void.

The indirect method, finally adopted by the prosecution in our cases below, and approved by the Court of Appeals, of treating the indictments in effect as though the substance thereof had been altered, although not physically changed, by disregarding as surplusage averments which had been placed therein by the Grand Jury following the practice of the Department of Justice in its effort to stand-

ardize what it believed to be essential and material averments in indictments of this character, is in clear violation of the constitutional rights of petitioners, and all others accused of crimes of this character, and is in conflict with the applicable decision of this Court in Ex Parte Bain, 121 U. S. 1, and contrary to the decisions of other circuits.

Edgerton v. United States, 143 F. (2d) 697 (9 C. A.);
Dodge v. United States, 258 F. 300, 305 (2 C. A.);
Butler v. United States, 20 F. (2d) 570 (8 C. A.);
Rule 7 (c) Federal Rules of Criminal Procedure.

To prevent grave injustice, not only to petitioners, but to all others accused of tax evasion, necessity requires the consideration and judicial determination by this Court of petitioners' questions in order to obtain uniformity of the judgments in the lower courts. The decision of the Seventh Circuit has so far departed from the accepted and usual course of judicial proceedings, and sanctioned such departure by the lower court, upon this matter of national importance in all tax evasion prosecutions, as to call for the exercise of this Court's power of supervision.

AS TO QUESTION TWO

Petitioner's request for a rehearing upon this question is limited to their contention that the proof of the receipt of "gross income" in commercial transactions does not make a prima facie showing of violation of Section 145 (b) of the Internal Revenue Code, and does not shift the burden to the defendants of proving their cost and expenses in such transactions. The cases were tried, and the convictions affirmed, upon the erroneous theory that they should have proved their innocence after the government introduced evidence showing gross receipts.

The practical effect of disputing this part of the decision below is to get a decision of this Court which will make

uniform all decisions in prosecutions for tax evasions where it is claimed by the accused that the burden rests upon the Government to show, beyond a reasonable doubt, that he actually had a net income upon which he owed a tax that he did not pay, and where he contends that proof of gross income from mercantile transactions does not make a prima facie showing of a violation of Section 145 (b).

Petitioners especially dispute that part of the decision below that,

> "Any possible prejudice to the defendants is seen to be even more remote if we consider the fact that defendants' principal defense is that the money received was merely gross income from which they should be allowed to deduct expenses which exceeded the income. If defendants were relying on the Government's original theory of joint venture, as they now claim they were, *why did not they attempt to rebut the government's case by introducing evidence of the expenses which they assert were incurred in the sale of the whiskey? Such evidence would have been admissible under the joint venture theory, but not under the dividend theory.* Yet they rested their case without introducing any evidence." (R. 279.) (Emphasis supplied.)

Where it is shown that gross income was received in a joint venture, and such gross income was derived from buying and selling an article of merchandise where costs and expenses in dealing therein are also clearly proven, the Government must go further and show either that such costs and expenses did not exist, or, that they were less than the gross receipts. Especially is this true where, as in this case, defendants had furnished detailed information to the government as to such costs and expenses more than two years before the trial was had. Supplying such

facts to the government so far in advance of the trial disproved felonious and wilful intent; it created a presumption of innocence, and the Government could not secure conviction without proving beyond reasonable doubt that such cost and expenses were not had, or that there was no reasonable excuse for claiming these. See:

Gleckman v. United States, 80 F. (2d) 394, 395-399;
Bryan v. United States, 175 F. (2d) 223;
Jones v. United States, 164 F. (2d) 398, 400 (5 C. A.);
Young v. United States, 97 F. (2d) 200 (5 C. A.).

This is a rule of law which affects the trial of all income tax evasion cases.

Defendants contend that the true rule which should determine their rights, and the rights of all others tried for tax evasion, is the one adopted by the Seventh Circuit in United States v. Fenwick, No. 9895, decided since our petition was filed, on November 4, 1949, not yet reported, but a copy of such opinion being the Appendix to defendant's reply brief heretofore filed; in the Fenwick decision, which is an income tax case, the court holds that the government has the burden of proof; that the burden *never* shifts to the defendant; that circumstantial evidence must be of such character as to exclude every reasonable hypothesis except that of guilt; the defendant is not compelled to take the stand; he is not compelled to make proof that he is innocent; he must be proved guilty beyond all reasonable doubt. In that case, the question was whether all of the assets of the defendant had been included in the government's computation of net worth, and the court said that where there is uncertainty on that question, such computation could not be relied upon, and that essential proof of no other assets was the corner-stone of the government's evidence. See, also,

Bryan v. United States (5 C. A.), 175 F. (2d) 223, certiorari granted, No. 178, October term, 1949.

The burden does not rest upon defendants to supply any evidence upon any of these matters.

Jones v. United States, 164 F. (2d) 398 (5 C. A.).

If uniformity in decisions of this character is to be achieved, this Court should grant the writs prayed for by petitioners and decide, where the evidence is circumstantial, whether a conviction of fraudulently attempting to evade the payment of an income tax can rest upon evidence which shows the receipt of gross income from dealing in an article of merchandise, where costs and expenses are shown to have resulted from such dealing, without the government proving that either such costs and expenses did not exist, or they were less than the gross receipts, or there was no reasonable excuse for claiming costs and expenses.

AS TO QUESTION THREE

Petitioners present to this Court the final judgment of the Seventh Circuit which decides that, "under the peculiar circumstances of the case," the Judgment of conviction on the conspiracy charge must be reversed because "it embodies the same crime as that based on the substantive charges," and other reasons stated. (R. 399, 400, 401, 402.)

We do not here have the question as to whether the commission of the substantive offense, and a conspiracy to commit such offense, are separate and distinct offenses within the rule that a conviction for conspiracy to commit the one will not bar a conviction of the other, as in Pinkerton v. United States, 328 U. S. 640. Such question was eliminated by the final decision of the Seventh Circuit that under the peculiar circumstances in *our cases both charges embodied the same crime.*

The Court of Appeals adjudged that the trial court in the instant cases failed to differentiate between the proof relative to the substantive charge and the conspiracy charge. Yet it was the *same* inadmissible proof *in all cases.* The Court of Appeals reversed only as to the conspiracy charge.

The cases of Kotteakos v. United States, 328 U. S. 750, and Fiswick v. United States, 329 U. S. 211, are decisive of our question here and there should be a reversal.

There can be no doubt remaining after reading the Memorandum Opinion of the trial court (R. 275-282) that in large part he premised his determination of guilt in all of the cases, upon the very proof which caused the Court of Appeals to reverse the conspiracy charge and which got into the Record because, as Circuit Judge Duffy said (R. 401), the trial court could not "entirely avoid the evil of opening the door at the trial for evidence inadmissible except for the conspiracy charge" on a consolidated trial.

On the decision of this Court in the case of Krulewitch v. United States, 336 U. S. 440, accentuated by the concurring opinion of Mr. Justice Jackson, the writ prayed for herein should be granted. Otherwise, the condemned unlawful practice which "is an abuse of the judicial process" (R. 400), will continue, notwithstanding that such procedure often constitutes a serious threat to a fair administration of justice.

Krulewitch v. United States, 336 U. S. 440, 445, 446.

Such prejudicial error being so shown by the final judgment of the Seventh Circuit as to the conspiracy charge, it necessarily follows that error contaminated the trial and confused the court as to the substantive charges. Peti-

tioners contend that this question requires consideration by this Court as it is very important in the administration of criminal law.

AS TO QUESTION FOUR

The final judgment of the Seventh Circuit reversing the conviction on the conspiracy charge partially because it embodied the same crime as that upon which the substantive charges were based, establishes the fact that prejudicial error occurred in the trial against the petitioners; such error could not have occurred except for the reason that said causes were wrongfully consolidated for trial, over petitioners' objections (R. 63) and in contravention of Rules 8 and 13 of the Federal Rules of Criminal Procedure.

Petitioners respectfully urge that the consolidation of their causes resulted in a gross miscarriage of justice as to them, and the decision which is disputed in this regard is not only violative of their constitutional and legal rights, but it is a question involving a principle of tremendous importance to other litigants in the administration of federal criminal law and procedure.

That such conclusion must follow, is clearly evidenced by the reasoning of Circuit Judge Duffy (R. 401) wherein he says:

> "Courts have protested vigorously against the current and perhaps growing habit to indict for conspiracy in addition to the substantive offense, and have pointed out that such procedure often constitutes a serious threat to a fair administration of justice. Krulewitch v. United States, 336 U. S. 440, 445-446. As far back as 1925, the Conference of Senior Circuit Judges pointed out the dangers of such practice. And any judge with trial court experience knows that the

> charge of conspiracy in an indictment is often used at the trial for the purpose of getting evidence into the record which would otherwise be inadmissible, and that the trial judge is often powerless to prevent such abuse. As was stated in the Krulewitch case, supra (p. 453), 'But the order of proof of so sprawling a charge is difficult for a judge to control'; * * *but he cannot entirely avoid the evil of opening the door at the trial for evidence inadmissible except for the conspiracy charge.*" (Emphasis supplied).

Judge Duffy was so strongly convinced of the prejudicial effect resulting to the defendants from the consolidation of the two charges which were made against them, that he also said:

> "This is the kind of a case, in my opinion, where it is an abuse of judicial process to charge conspiracy when practically the same offense has been charged in the substantive counts." (R. 400.)

Chief Judge Major said:

> "I think the judgment premised on conspiracy should be reversed because under the peculiar circumstances of the case it embodies the same crime as that based on the substantive charges. A more conclusive reason for reversal, however, arises from the failure of the Court to differentiate between the proof relevant to the substantive offense and that relative to the conspiracy charge." (R. 399.)

Petitioners very earnestly urge that the final judgment of the Court of Appeals reversing the conspiracy charge is conclusive that prejudicial error was committed against petitioners because of the wrongful consolidation of said causes.

The opinions of Chief Judge Major and Circuit Judge Duffy (R. 398-402) present strong, vigorous, judicial rea-

sons why this Court should grant the writs prayed for herein, and clearly show that substantial prejudice has resulted to the defendants by the proceedings below, and they likewise show that this question involves a very important principle of criminal law which it is vital for this Court now to decide.

CONCLUSION

This Court cannot say that the judgments in these cases were not substantially swayed by the prejudicial errors which we have pointed out and it is impossible to conclude that the substantial rights of defendants were not affected or that justice has been done by reversing part of the convictions, merely.

Petitioners urge that their petition presents tremendously important principles, and involves the decision of questions whose resolution will have immediate importance far beyond the particular facts and parties affected, especially in income tax evasion cases.

Prejudicial error being now judicially established, petitioners respectfully request this Court to reconsider its order of December 5, 1949, denying certiorari herein.

It cannot be said that petitioners have been justly tried and fairly convicted of any of the charges for which they were tried where it is adjudicated that their conviction is tainted with judicial inability to differentiate as to the evidence applicable to the charges against them; the same errors are bound to affect many others unless this Court shall intervene and decide the questions which are presented; uniformity of decisions will only be established by the decision of this Court on these questions.

It is respectfully urged that the order denying certiorari be set aside and that certiorari be granted as prayed for in the petition.

Dated this 19th day of December, 1949.

ALBERT WARD,

PALMER K. WARD,
318 Insurance Bldg.,
Indianapolis, Ind.,

WILLIAM B. HARRELL,
Republic Bank Bldg.,
Dallas, Texas,
Counsel for Petitioners.

CERTIFICATE OF COUNSEL

We, Albert Ward, Palmer K. Ward and William B. Harrell, counsel for petitioners, do hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and that said Petition is restricted to grounds which are confined to intervening circumstances of substantial and controlling effect, and to other substantial grounds available to petitioners although not previously presented, as required by Rule 33 (2) of the Rules of the United States Supreme Court.

Dated this 19th day of December, 1949.

ALBERT WARD,

PALMER K. WARD,

WILLIAM B. HARRELL,
Counsel for Petitioners.